91-1852

Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1991

JOHN McGOVERN, CARL SHUBERT and NAT SILVER,

Petitioners,

vs.

TOWN OF YORKTOWN, TOWN BOARD OF YORKTOWN and NANCY ELLIOTT, NEAL BAILENSON, GARY AJELLO, BARBARA WILKENS and ALBERT HAMMOND, sued both individually and as members of the Town Board of Yorktown,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

KENNETH F. McCALLION
Counsel of Record
PETER H. McCALLION
Attorneys for Petitioners
Garrison's Landing
Garrison, New York 10524
(914) 424-3711

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QUESTIONS PRESENTED

I. Did the court below err in finding that the local law which increased the minimum lot size of the petitioners' property from one-half acre to four acres was not a taking of property without just compensation?

II. Did the court below err in finding that the upzoning by 800% was not a taking of property without just compensation, where the petitioners had a contract to sell the property for $1,200,000 before the upzoning, and due to the upzoning the sale was made impossible?

III. Did the court below err in finding that there was no violation of due process or the Takings Clause, although the stated purpose of the upzoning was because of an inadequate road, and the petitioners would not have used this road for access to their property?

IV. Did the court below in finding there was no violation of due process or the Takings Clause, despite the fact that the upzoning of the petitioners' property was designed to accomplish objectives different from those stated by the Town Board, namely to win re-election and to attempt to force the petitioners to provide affordable housing?

V. Did the court below err in finding that there was no violation of equal protection, where the local law made two-thirds of the parcels within the new zoning district non-conforming, and the town admitted that the upzoning was specifically directed at the petitioners' property?

VI. Did the court below err in finding that the upzoning did not constitute spot zoning?

VII. Did the court below err in finding that the petitioners were not deprived of their constitutional rights under color of law?

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JOHN McGOVERN, CARL SHUBERT and NAT SILVER,
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

OPINIONS BELOW

The opinions of the Court of Appeals of the State of New York are reported at 79 N.Y. 2d 753 and 78 N.Y. 2d 1071, 582 N.E. 2d 604, 576 N.Y.S. 2d 221. The opinion of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, is reported at 172 A.D. 2d 594, 570 N.Y.S. 2d 946. The opinion of the Supreme Court of the State of New York, County of Westchester, is unreported.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals of the State of New York was made and entered on January 16, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

This Court has jurisdiction of the proposed appeal because the appeal is from a final determination of the highest court of the State of New York, and it involves a case where the rights to due process, equal protection, and against taking of property without just compensation are claimed under the Constitution of the United States. It also involves a question of deprivation of civil rights under color of law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Fourteenth Amendments to the United States Constitution and the Civil Rights Act of 1871, 42 U.S.C. § 1983 are involved in this case (*see* Appendix E).

STATEMENT OF FACTS

The complaint was dismissed by the Supreme Court, Westchester County after Judge Sondra Miller granted defendants' motion for summary judgment, denied plaintiffs' motion for summary judgment, and declared the local law in question, which raised the zoning on plaintiffs' property from one half acre to four acres, constitutional. The decision and order of Judge Miller, a copy of which is attached in the Appendix, was entered on October 13, 1989.

Plaintiffs appealed to the Appellate Division, Second Department. The Appellate Division affirmed the order of Judge Miller. The decision and order of the Appellate Division, a copy of which is attached in the Appendix, was entered on April 8, 1991.

Plaintiffs appealed to the Court of Appeals of the State of New York under § 5601(b)(1) of the New York Civil Practice Law and Rules, on the basis that the order of the Appellate Division finally determined an action where there was directly involved the construction of the Constitution of the State and of the United States.

The Court of Appeals of the State of New York, by order dated October 24, 1991, a copy of which is attached in the Appendix, dismissed the appeal *sua sponte*, upon the ground that no substantial constitutional question was directly involved.

The plaintiffs made a motion for leave to appeal to the Court of Appeals of the State of New York under New York Civil Practice Law and Rules § 5602(a). The motion was denied by order dated January 16, 1992, a copy of which is attached in the Appendix.

REASONS FOR GRANTING THE WRIT

I.

BACKGROUND

The questions involved in this proposed appeal merit review by this Court, as they are currently a subject of evolving law which are being examined by this Court. The subject of taking of property by regulation is one which is of public importance, due to the increasing burdens placed upon property owners by government.

This case involves the construction of the Due Process and Equal Protection Clauses of the Fifth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, and the Taking Without Just Compensation Clause of the Fifth Amendment to the United States

Constitution, made applicable to the States by the United States Supreme Court in *Chicago Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 17 S. Ct. 581 (1987).

The local law which is in question on this appeal raised the zoning on the plaintiffs' thirty acre property from one half acre to four acres, an increase of 800%. The magnitude of the increase alone is enough to render the law invalid, as such an increase has never been sustained by the courts of any state. What makes the law particularly pernicious, however, is the fact that it was aimed specifically at the plaintiffs' property and one other thirty acre property. Zoning measures which single out one or two property owners to bear the burden of a municipal policy, in this case the policy of limiting further development of a district which has already been developed as a commercial and multi-family district, violate both the Takings Clause and the Equal Protection Clause. *Nollan v. California Coastal Commission*, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).

The local law was enacted in reaction to the proposed development of the plaintiffs' property under the then existing zoning. The plaintiffs executed a contract to sell their property for $1,200,000 in 1987, contingent upon the zoning remaining as half acre. The Town was apprised of this contract, and reacted by upzoning to four acres, which rendered the sale impossible.

Although the local law purports to affect fifty-two parcels, in fact about two-thirds of those parcels are less than four acres, so that the law renders the majority of parcels nonconforming. The Planning Department acknowledged that the reason for the upzoning was "the large vacant parcels" in the Indian Hill area when it recommended upzoning to one acre.

The plaintiffs' property and the adjoining property of Indian Hill Associates, Inc. make up 60 of the 180 acres in the new district.

These were the only properties on which development had been proposed.

Where a zoning measure clearly is directed specifically at one or two owners, as here, the Takings Clause should act "to bar Government from forcing some people to bear the public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The Planning Department was pressured by the Town Board to issue a second report, dated the same day as the first report, which recommended upzoning to two acres. But even this recommendation was ignored by the Town Board, which was facing re-election in November, 1987, and wanted to win the votes of the residents in the Indian Hill area who wanted to keep the undeveloped parcels vacant.

Land use regulation which arbitrarily discriminates against a property owner does not "substantially advance a legitimate state interest". *Nollan, supra.* In the absence of such substantial advancement of a legitimate state interest, the Takings Clause requires that the measure either be invalidated, with compensation to the property owner for the period of the taking, or that the property owner be fully compensated for the taking. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978); *First Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987).

Where there is a violation of the Equal Protection Clause, such as in this case, where the plaintiffs were singled out to bear the brunt of a drastic upzoning measure so that the Town Board could win re-election, there need be no showing of a complete confiscation. *Northern Westchester Professional Park v. Town of Bedford*, 60 N.Y. 2d 492, 494, 470 N.Y.S. 2d 350 (1983).

The fact that the plaintiffs' property diminished in value from $1,200,000, the contract price, to a point where it was virtually unmarketable, shows that there has also been a severe diminution in value, such as to render the measure invalid under the second prong of the Takings Clause. Where an owner has been denied an economically viable use of his land, even if the measure substantially advances a legitimate state purpose, it violates the Takings Clause. *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

Where a taking question is involved, the standard to be applied is not the "rational basis" standard which otherwise applies to state action, but the higher "substantial advancement of a legitimate state interest" standard. *Nollan v. California Coastal Commission*, 107 S. Ct., 3147, footnote 3.

Therefore, the cases cited by the respondents in the courts below, to the effect that the petitioners cannot prevail unless they prove that the law in question has no rational basis, have been overruled by the explicit holding of the United States Supreme Court in *Nollan*.

In addition, the United States Supreme Court in *Nollan* and *First Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987) has made it clear that a complete confiscation, or a taking by regulation which leaves only a bare residue of value, is not required. The test is whether the property owner has been denied an "economically viable use" of his property.

II.

TAKING WITHOUT JUST COMPENSATION

A zoning regulation is unconstitutional as a violation of the Takings Clause if it does not substantially advance a legitimate

state interest or if it renders the property unsuitable for any reasonable income productive use. In the case at bar, there is a taking under both of these standards.

The United States Supreme Court has emphasized the need for a sufficient relationship between the regulation and the property regulated in a takings context in *Nollan v. California Coastal Commission*, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987). The Coastal Commission in that case conditioned the plaintiffs' building permit upon the grant of an easement to the public to cross their beach. The court recognized that, despite the fact that the condition imposed was a regulation and not an exercise of eminent domain, the measure involved the question of whether there was a taking of property. Because there was not a sufficient connection between the regulation and the state interest in this case, it was found that the regulation did not substantially advance the state interest, and therefore was invalid.

The court quoted *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S. Ct. 2138, 2141 (1980) in stating that land use regulations must "substantially advance legitimate state interests" and must not "deny an owner economically viable use of his land." In the takings field the court applies a higher standard than that applied in a non-taking due process or equal protection case, the *Nollan* court declared.

When dealing with a takings case, the court requires:

> . . . that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S. Ct. 2138, 2141, 65 L. Ed. 2d 106 (1980), not that "the State '*could rationally have decided*' the measure adopted might achieve the State's objective". [Brennan dissent], quoting *Minnesota*

> *v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466, 101 S. Ct. 715, 725, 66 L. Ed. 659 (1981). Justice Brennan relies principally on an equal protection case, *Minnesota v. Clover Leaf Creamery Co., supra*, and two substantive due process cases, *Williams v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-488, 75 S. Ct. 461, 464-465, 99 L. Ed. 563 (1955), and *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423, 72 S. Ct. 405, 407, 96 L. Ed. 469 (1952) in support of the standards he would adopt. But there is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical; any more than there is any reason to believe that so long as the regulation of speech is at issue the standards for due process challenges, equal protection challenges, and First Amendment challenges are identical. *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), does appear to assume that the inquiries are the same, but that assumption is inconsistent with the formulations of our later cases.

107 S. Ct. 3147, footnote 3.

The Supreme Court has in this case clarified what the language of its cases dealing with takings of property after 1962 has implied. Now, there can be no question that the standard to be applied in these cases is higher than the "rational basis" test used to justify state action in ordinary due process and equal protection cases. Instead, the standard is the substantial advancement of a legitimate state interest. The first question to be determined is whether the case at bar is a case involving a taking of property, rather than

a regulation of property which violates only due process and equal protection. The court made clear at the outset of *Nollan* that a taking may occur as a result of regulation, even with no physical confiscation.

One type of taking consists of a regulation that so drastically interferes with the owner's use of his property that it denies him "economically viable use of his land." *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). Another type is where the restriction is not "reasonably necessary to the effectuation of a substantial government purpose." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978). A third type is where the owners are "singled out to bear the burden of [the state's] attempt to remedy these problems, although they had not contributed to it more than other" landowners. *Nollan v. Coastal Commission*, 107 S. Ct. 3147, footnote 4.

The plaintiffs' have been denied economically viable use of their land. In addition, as previously discussed, the upzoning was intended purportedly to avoid the necessity of using Indian Hill Road. The plaintiffs, however, own an easement onto Route 6 which will not necessitate their using Indian Hill Road. Therefore, the law in question, as applied to the plaintiffs' property, is not "reasonably necessary to the effectuation of a substantial governmental purpose." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978).

The case at bar also constitutes a taking under the third definition enunciated by the *Nollan* court. The plaintiffs have not contributed to the problems associated with development such as traffic and demand for municipal services in the Jefferson Valley area. The Town of Yorktown has created these problems, which are a necessary offshoot of the long-standing decision to commercialize and allow multi-family development in the neighborhood. The Town cannot now burden the plaintiffs with

the denial of a use of their property which has been permitted during all the years of intense development around them, and which none of their neighbors have been asked to suffer.

As the Supreme Court stated in *Armstrong v. United States*, 364 U.S. 40, 49 (1960), one of the main reasons for the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *See also, Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123 (1978).

The second type of taking is the situation dealt with in *Nollan*. The court admitted that the purposes of the regulation, to prevent congestion on the public beaches, and to provide aesthetic enjoyment for the public, were legitimate state purposes.

But the *Nollan* court pointed out a very important aspect of the rule that the regulation must serve a state purpose. As the court put it:

> The evident constitutional propriety disappears, however, if the . . . prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state's treasury.

107 S. Ct. 3148.

The analogy to the case at bar is quite apt. In the Town of Yorktown, an affordable housing policy was enacted, which allows a developer to achieve an increase in density beyond that otherwise allowed by the zoning code, if he agrees to build some housing for lower income buyers.

The purpose of the upzoning to four acres was supposedly to decrease residential densities. But the Town allows increased densities to provide for affordable housing. The paradox is that the upzoning from one half to four acre zoning is in itself the most significant factor in making housing unaffordable to those wishing to make their homes in the area. To grant a dispensation to those willing to sell homes at below cost, for the purpose of achieving affordable housing, is directly contrary to the stated purpose of upzoning.

The Town of Yorktown, in effect, has allowed those who pay the cost of selling houses at below market prices the opportunity to shout fire in a crowded theater.

What is the reasoning behind this apparently contradictory set of policies? Perhaps the Town Board feels that increasing the lot sizes in a limited area, with all its attendant political overtones, might render the affordable policies of the Town more palatable to the electorate. If so, the legitimate public purpose of encouraging low-cost housing has fallen upon the plaintiffs alone, and is therefore a taking under the third principle enunciated in *Nollan*.

But the *Nollan* case creates a logical system of analysis which avoids the need to look into the reasoning process of public officials. The regulation is stated to be designed to reduce residential densities. The regulation is waived if the owner agrees to conform to an unrelated purpose of the Town, namely, creation of affordable housing. The building restriction is therefore not a valid regulation of land use, but "an out-and-out plan of extortion." *J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981); see Brief for United States as Amicus Curiae 22, and n. 20.

An investor who bought land under half acre zoning and

finds the zone changed to four acres is thus faced with two alternatives. He can try to market mini-estates in a commercial and multi-family neighborhood, or he can achieve a 50% increase in density, which returns the zoning, in effect, to two acres, if he submits to the requirement that some of the houses he builds will be sold below cost. The affordable housing law, with its trade-off of density for low-cost housing, was passed a few months after the upzoning to four acres, in January, 1988.

As the *Nollan* case states:

> the lack of nexus between the condition and the original purpose of the building restriction converts that purpose into something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of "legitimate state interests" in the takings and land use context, this is not one of them.

107 S. Ct. 3148.

What is the effect of such a method of land use regulation? Precisely the opposite of the stated goal of the Town in enacting the local law in question, and it is this fact that, as in *Nollan*, makes the regulation unconstitutional.

As the court in *Nollan* stated:

> One would expect that a regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulation which the State then waives to accomplish other purposes, leading to lesser realization of the land-use goals

> purportedly sought to be served than would result from more lenient but (non-tradeable) development restrictions. Thus, the importance of the purpose underlying the prohibition not only does not justify the imposition of unrelated conditions for eliminating the prohibition, but positively militates against the practice.

107 S. Ct. 3148, footnote 5.

Prior to the enactment of the two regulations in September, 1987 and January, 1988 by the Town of Yorktown, the Supreme Court had declared such schemes unconstitutional. Under the clear and unambiguous rule of *Nollan*, the upzoning/downzoning, quid pro quo formula must be found invalid, and the law in question held inapplicable to the plaintiffs' property.

The condition imposed to increase density amounts to a confiscation of property, because the affordable housing law requires houses to be sold for below cost in order to qualify for the bonus. After paying normally high prices for land, improvements, and construction costs, a builder will lose money on each of these units. But the incentive is that he will have up to 50% more units to sell. Without the precedent upzoning, the owner is faced with a business decision which he is free to accept or reject.

The confiscatory nature of the two ordinances, however, is produced by their relationship. The upzoning of the plaintiffs' property by 800% creates the taking, not only because of the obvious drastic reduction in value, but because the only way out offered, other than recourse to the courts, is to give away some land at a loss in order to alleviate partially the horrendous impact of the upzoning.

As the Supreme Court stated in *Nollan*:

> . . . our cases describe the condition for abridgement of property rights through the police power as a "substantial advancing" of a legitimate State interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is a heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective.

107 S. Ct. 3150.

In *Nollan*, the benefit was to allow the public to have lateral access to the beaches by permitting them to cross private property. This is not a bad thing, nor is providing affordable housing bad. The way California obtained the easement it desired was to condition the Nollans' building permit on their acquiescence to the public use. In the case at bar, the way Yorktown obtains property for affordable housing is by extorting concessions from owners after a drastic upzoning. It conditions relief from the oppressive zoning upon the owners' grant of land at little or no cost to those who otherwise could not afford to purchase a home.

The public may indeed be served in both cases. However, that does not mean that the plaintiffs can be compelled to contribute to the fulfillment of these public purposes without compensation. Yorktown, as California, "is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose,' " *Nollan*, 107 S. Ct. 3150, but if it wants to do so, it must pay for the plaintiffs' property.

The Supreme Court in *Nollan* echoed the concerns expressed by Justice Holmes sixty-five years earlier in *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922). The court in that case struck down a law which forbade mining in such a way as to cause subsistence of any buildings or streets. The only way to achieve the public purpose in this case, the court held, was to pay the owner for the property which was thus taken.

The circumstances surrounding the passage of the law in *Pennsylvania Coal* were similar to those in the case at bar. It was "passed at the insistence of a determined and organized minority, designed to confiscate for their benefit the rights of producers of property, and passed by a legislature in time of political stress, in its anxiety to secure the votes controlled by the advocates of the measure . . . To protect a complaisant public from such laws is one of the primary functions of the courts." *Argument for Plaintiff*, 260 U.S. 393, 396.

The law in question was designed to protect the interests of competitors of the coal industry, not to really protect the public. The law in question in the case at bar was similarly designed to enhance the property values of the plaintiffs' neighbors by providing a greenspace, not to protect the public from the evils of over-development.

Even assuming a public purpose, however, the only way to accomplish it would be to pay for the property, the court held.

Justice Holmes wrote:

> The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation... When this

> seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.
>
> The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

260 U.S. 415, 416.

The State of California in *Nollan*, the State of Pennsylvania in *Pennsylvania Coal*, and the Town of Yorktown in the case at bar were all acting in their enterprise capacity in enacting the laws which on their face are merely regulatory. When a state or municipality acts in its enterprise capacity, despite the facade of regulation, the courts should find there is a taking without just compensation when the value of the affected property is significantly diminished. *Lutheran Church in America v. City of New York*, 35 N.Y. 2d 123, 359 N.Y.S. 2d 7 (1974).

In *Lutheran Church*, the City designated the Morgan house, owned by the church, as an historic landmark. The church was prevented by the Landmark Law from altering or destroying the building, which had become inadequate for the church's purposes.

The court found that the ordinance was unconstitutional as a taking of property. It pointed out the difference between true

regulation and a case such as this, where the government acts in an enterprise capacity. True regulation by zoning, the court found, consists in acting as an arbitrator between neighbors to ensure that the use of an owner's land harmonizes with other uses in the district.

The regulation in question in the case at bar does quite the opposite, by creating an island of four acre lots in a sea of commercial, multi-family, and small lot uses. The reason for the regulation was either to create a greenspace, if the owner decided not to participate in the affordable housing scheme, or to achieve the goal of obtaining property at no cost for affordable housing. Either goal was designed not to ensure the harmony of plaintiffs' use with the surrounding uses, but to achieve a distinct governmental goal. Such a use of the zoning power falls within the scope of the government's enterprise capacity.

The upzoning in the case at bar was undertaken by the Town in its enterprise capacity, because it was not intended to mediate the conflicting desires of its citizens and accomplish the goals of a comprehensive zoning plan, but to grant benefits to one set of individuals without any reciprocal benefit to the plaintiffs. The neighbors who enjoy the maintenance of the greenspace on plaintiffs' property, or those who take advantage of the extorted affordable housing gift, would benefit from the law, but the plaintiffs ought not be forced to pay for these benefits to others without compensation.

The most obvious form of taking is where the restriction so drastically reduces the value of the property as to amount to a confiscation, which must be paid for by the government in order to be valid. A case of an upzoning from one eighth acre to one acre lots was found to be unconstitutional as a confiscation in *Spanier v. Town of Huntington*, 19 Misc. 2d 979, 188 N.Y.S. 2d 381 (S. Ct. Suffolk Cty., 1959). This case presents the same

800% increase as in the case at bar. The 800% increase should in the instant action be similarly declared to be a taking of property without just compensation, based on the magnitude of the diminution in value.

As in the case at bar, the lot size required by the new zoning was not in accordance with the surrounding neighborhood, and the cost of the housing under the new zoning would have to be substantially higher than the cost of the existing homes. The obvious difficulty in marketing such expensive homes in a neighborhood of moderately priced homes was taken into account in the determination of confiscation.

Homes in the Indian Hill area have sold for modest prices, from $110,000 to $160,000, recently. The price of homes on four acre lots would have to be far higher, about $400,000, in order to justify the significant development expenses. The plaintiffs, therefore, would be forced to expend considerable amounts of money to place houses on the market in the hopes that they could sell houses which would be far more expensive than those existing in the area today. This fact, combined with a "drastic reduction in value tends to establish that the property is not reasonably suited for the uses prescribed in the ordinance." *Grimpel Associates v. Cohalan*, 41 N.Y. 2d 431, 393 N.Y.S. 2d 373 (1977).

In *First Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987), this Court held that where there has been a deprivation of property rights by regulation amounting to a taking of property without just compensation, the courts should award monetary damages for the loss of use of the property during the period of the taking, even where the regulation is declared invalid.

This new precedent was recognized in *Seawall Associates v. City of New York*, 138 Misc. 2d 96, 523 N.Y.S. 2d 353, *aff'd*,

74 N.Y. 2d 92, 544 N.Y.S. 2d 542 (1989). The statute in question in this case prohibited the conversion, alteration or demolition of single-room occupancy units, in an attempt to avoid an increase in the homeless population of the city. The question was whether this regulation under the police power so severely restricted the enjoyment of property rights as to amount to a taking for which compensation must be paid.

The court noted that "according to the Court of Appeals, a regulation may violate due process and not constitute a taking (*French, supra*) or it may constitute both. (*Lutheran in America, supra*)." 138 Misc. 2d 103. The element necessary to establish a taking was the deprivation of the property's "free use and enjoyment or the power of disposition at the will of the owner." *Lutheran Church in America v. City of New York*, 35 N.Y. 2d, 130, 359 N.Y.S. 2d 7.

The court found that there was a violation of due process because the statute forced "the owner to assume the cost of providing a benefit to the public without recoupment", quoting *French*, 39 N.Y. 2d 596. This fact made the statute unjustifiable as an exercise of the police power.

To determine whether there was a taking, however, the government's justification was found irrelevant. Property must be paid for if taken regardless of the reason for the taking. Taking was, before *Nollan*, defined as a frustration of investment-backed expectations to a significant degree, so as to deny an owner economically viable use of his land. After *Nollan*, a second part was added to the takings test, namely, the requirement that there must be a sufficient nexus between the ends and the means of the regulation.

If a taking is found, under either of the two prongs of the takings test, then the government must pay just compensation

"even when an excessive police power regulation is only temporary." *Seawall Associates v. City of New York*, 138 Misc. 2d 96, 114. The court in *Seawall* found the statute in question to constitute a taking, even though the plaintiffs could still make some use of their property.

The court stated:

> In *Nollan*, supra, the condition imposed upon the petitioners, while diminishing the value of their lot, did not deprive them of all reasonable use of their property. The Supreme Court still found an unconstitutional interference with the Nollan's property rights, warranting payment of just compensation.

138 Misc. 2d 115.

As the Supreme Court stated in *First Evangelical Lutheran Church*, "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." 107 S. Ct. 2389.

The application of the new rules to the case at bar require that the plaintiffs be awarded damages for the loss of use of their property between the date of the taking to the date that the court rescinds the regulation. The regulation must be rescinded because it denies the plaintiffs economically viable use of their land, and, as discussed above, *Nollan's* requirement of a relationship between the regulation and the goal is lacking.

III.

EQUAL PROTECTION

Because the law in question was directed at the plaintiffs' property, imposing undue burdens upon them without a corresponding enjoyment of any benefits, it violates the equal protection clause. The law should be found invalid because it is spot zoning, creating an island of large estate-sized lots in a surrounding neighborhood of commercial and small residential lots.

As the zoning map of the Town of Yorktown shows, the new four acre zone on Indian Hill, which even within the zone is comprised primarily of lots smaller than four acres, is surrounded by office-business, industrial, retail-commercial, quarter-acre, and multifamily zones. A regional shopping center, the Jefferson Valley Mall, is across the street. Adjacent to the parcel is Contractor's Register, a large office complex.

The parcel is at the intersection of the Taconic State Parkway and Route 6, the major north-south and east-west thoroughfares in that part of the county. For miles in either direction along Route 6, in addition to the shopping mall, are businesses, apartment buildings and condominium complexes. One complex alone, Jefferson Village, has about 1,000 units. This complex is about one half mile from the plaintiffs' property. To declare that the plaintiffs' property, after being zoned half acre while this entire development process took place around it, should now become an enclave of quiet and retirement for those seeking the seclusion of large estates is to unconstitutionally burden the plaintiffs with the belated desire to turn back the clock on the past twenty years.

Judge Lehman wrote, in *Dowsey v. Kensington*, 257 N.Y. 221, 231, 177 N.E. 427 (1931), "Certainly an ordinance is

unreasonable which restricts property upon the boundary of the village to a use for which the property is not adapted and thereby destroys the greater part of its value in order that the beauty of the village as a whole may be enhanced."

In the case at bar, the Town long ago decided that this area was suitable for business and multi-family purposes. To now seek to preserve a portion of this area as a greenspace, in order to balance out to a small degree the commercial nature of the district, is to impose a burden on the plaintiffs alone, for the sake of the other residents and visitors to the neighborhood. When an ordinance falls unduly upon one or two property owners, and a burden which should be shared among the community becomes that of an isolated individual, the courts should hold the measure unconstitutional.

Judge Lehman again addressed this issue a few years later in *Arverne Bay Construction Company v. Thatcher*, 278 N.Y. 222, 15 N.E. 2d 587 (1938). He stressed the fact that these cases must be dealt with by application of the rule of reason. It was unreasonable, the court found, to restrict the plaintiff to a residential use when the entire neighborhood was used for commercial purposes. While recognizing the need for long-range planning, the court held that, "The legislative power of the State is, however, not plenary, but is limited by the Constitution of the United States and by the Constitution of the State." 278 N.Y. 231.

In *Rockdale Construction Corp. v. Cedarhurst*, 301 N.Y. 519, 93 N.E. 2d 76 (1950), the Court of Appeals held that an ordinance which prohibited the use of the plaintiff's property for business purposes was invalid, because it was located on a highway with heavy traffic, and opposite the plaintiff's property business uses were permitted. The Court found that the property would be worth seven times as much if used for business purposes, and

this fact, combined with the fact that the restriction was unreasonable, rendered the ordinance invalid. The discriminatory nature of the law, together with the diminution in value, amounted to a taking.

Rockdale Construction v. Cedarhurst, supra, is noteworthy in that the diminution in value from the potential, reasonable use of the property to its value under the ordinance in question was considered to be a taking, even though the property could be put to some use under the ordinance. The important finding was that there was unfairness in terms of similar property being treated dissimilarly. In the case at bar, there is also this basic factor of inequity, and the fact that some use may be made of the property should not prevent a finding of invalidity of the law as applied to the plaintiffs' land.

The Court of Appeals reaffirmed this principle in *Vernon Park Realty, Inc. v. City of Mount Vernon*, 307 N.Y. 493, 121 N.E. 2d 517 (1954). The plaintiff in that case owned a parking lot in the middle of a business district. He wanted to build a retail shopping center on the property, but the City zoned it so that it could be used only for a parking lot. The court held the ordinance invalid, stating that, "However compelling and acute the community traffic problem may be, its solution does not lie in placing an undue and uncompensated burden on the individual owner of a single parcel of land in the guise of regulation, even for a public purpose." 307 N.Y. 498. In the case at bar, it is likewise impermissible to prevent the plaintiffs from devoting their property to a use similar to that of other properties similarly situated.

Even within the new zoning district, most owners are permitted to use their property as a non-conforming use, with lots less than four acres. Other property adjacent to the new zone is used for multi-family and commercial purposes. It is significant

to note that the court in *Vernon Park* struck down the ordinance because of its discriminatory nature, even though the plaintiff could have used his property for a parking lot.

The rule that even where an owner can make a profit, an ordinance may be held invalid as a taking, was reiterated in *Fulling v. Palumbo*, 21 N.Y. 2d 30, 286 N.Y.S. 2d 249 (1967). Once again, the Court of Appeals was strongly influenced by the discriminatory nature of the ordinance.

In equal protection cases, it is clear from the line of decisions cited that the lost profits of the plaintiff are taken into account in determining if there has been a taking such as to render the ordinance invalid.

The classic statement of how discrimination in zoning will be held unconstitutional, even in the absence of confiscation in its usual sense, is *Udell v. Haas*, 21 N.Y. 2d 463, 288 N.Y.S. 2d 888 (1967). In that case, the plaintiff's property was rezoned from business to residential. The court held that because "the rezoning was discriminatory and not done 'in accordance with the comprehensive plan' of the Village of Lake Success" the ordinance was invalid. 21 N.Y. 2d 468.

The parallels to the case at bar are striking. The Town Board in this case was found to have been acting in response to the desires of the public, rather than in fulfillment of a well-considered plan that would take into account the needs of the whole community.

The Town Board in the case at bar did not consider the alternative road which the plaintiffs proposed, because they wanted to win a few votes in the upcoming election, despite the fact that this road would have been for the benefit of that very group which was urging the upzoning out of fear of the unknown.

The two reports of the Planning Department, which were dated the same day, but recommending differing results for

contradictory reasons, is evidence that the experts, the Planning Department in the case at bar, were placed in the role of "giving rationalizations for actions previously decided upon or already carried out." *Udell v. Haas*, 21 N.Y. 2d 471.

Just as in the case at bar, the Village's expert in *Udell v. Haas* contradicted his own earlier recommendations as well as the Village's own position. The court easily saw through the Village's "race to the statute books" in the face of a proposal for development.

The test of discrimination in zoning is "the propriety of the treatment of the subject parcel as compared to neighboring properties." 21 N.Y. 2d 476. Because there was nothing to differentiate between the adjoining parcels, which would become existing nonconforming uses under the ordinance, and the appellant's parcel, the court found that discrimination existed.

The court also stated bluntly, "A property owner need not prove confiscation to establish discrimination." 21 N.Y. 2d 477.

The combination of discrimination and frustration of investment-backed expectations in the case at bar should result in the declaration that the law in question is invalid as applied to the plaintiffs' property. Because this is a case where the plaintiffs have been treated in a discriminatory fashion, in violation of equal protection, and because the ordinance is not reasonably related to a legitimate public purpose, there is no requirement that a complete confiscation be shown.

The United States Supreme Court has held that a regulation which has the effect of substantially frustrating "reasonable investment backed expectation" constitutes a per se taking. *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 600 S. Ct. 383, 390; *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 493, 499, 107 S. Ct. 1232, 1246, 1249.

The United States Supreme Court has also stated, in *Nollan v. California Coastal Commission*, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), that the scope of classic "takings" cases includes nonconfiscation fact patterns. *Nollan*, 107 S. Ct. 3147. In a "takings" case the standard to be applied by the courts, the Supreme Court has declared, is that the regulation must substantially advance a legitimate state interest. *Nollan*, 107 S. Ct. 3147, footnote 3.

Where, as in the case at bar, there is a singling out of a landowner to bear the burden of the regulation, despite that landowner's failure to contribute more than other landowners to the problem sought to be solved by the regulation, the U.S. Supreme Court has declared there is a violation of the Takings Clause. *Nollan*, 107 S. Ct. 3147, footnote 4. In such a situation, the higher standard cited must be applied, namely, the substantial advancing of a legitimate state interest, not the "rational basis" test which otherwise applies to state action.

Therefore, under the rule recently enunciated by the United States Supreme Court in *Nollan*, the Town in the case at bar must prove that the law in question substantially advances a legitimate state interest. Only after it has done so does the burden of proof fall back upon the plaintiffs. For the reasons cited above and herein, it is respectfully submitted that the Town cannot do so, and that the law in question should, therefore, be found unconstitutional.

IV.

DUE PROCESS

A zoning ordinance violates due process when there is no substantial relationship between the ordinance and a legitimate zoning purpose. It is also contrary to due process for an ordinance

to be arbitrary, in that the purpose of the ordinance and the means used to effectuate that purpose are not reasonably related.

The equal protection cases focus on the relationship between the property affected by the ordinance and other surrounding properties, to determine if there is a discriminatory impact. The due process cases focus on the relationship between the property affected and the ordinance itself, to determine if there is a reasonable nexus which advances a legitimate public interest.

The stated purpose of the law in question is to reduce residential density because of the narrowness of Indian Hill Road. But the plaintiffs' property contains an easement which gives access to Route 6, and the plaintiffs have offered to build a road across this easement so as to avoid any need to use Indian Hill Road. Therefore, there is no nexus between the stated goal of the law and the upzoning of the plaintiffs' property to four acres.

The plaintiffs purchased the property when the area was primarily a quiet residential neighborhood. Over the years the area has grown into a commercial and retail hub for the entire region, and an unprecedented complex of apartment buildings and condominiums has sprung up. Right next to the plaintiffs' property a large office complex has recently been constructed. Yet the Town Board upzoned the plaintiffs' property to estate-sized lots, eight times the pre-existing zoning, supposedly to avoid the pitfalls of development.

Clearly the plaintiffs' small development will do little or nothing to affect the traffic and population of the area, because it will amount to but a drop in the sea of progress which the Town consciously decided to encourage many years ago. The plaintiffs, as intelligent investors, waited until the property values had risen to what appeared to be a peak, patiently paying their taxes every year. When they finally decided to sell, the Town

upzoned to a point where the property was unmarketable. The difficulty of finding buyers of estate sized lots in such a neighborhood would be so great that the plaintiffs have been deprived of any reasonable use of their property.

In *Stevens v. Town of Huntington*, 20 N.Y. 2d 352, 283 N.Y.S. 2d 16 (1967), the prevention of additional traffic was determined to be the true reason for the measure, but it was held unconstitutional to place all the burden on an individual owner under the guise of regulation, even though there was a public purpose. Because there would be a significant diminution in value under the new zoning, and the stated goals would not be accomplished to any significant degree by the ordinance being sustained, it was found to be tantamount to confiscation to place such a restriction on the plaintiffs.

When the municipality acts in a discriminatory or arbitrary manner, there is a taking even where the owner may not lose any money on his investment, but is only prevented from making the profit which he would have made had the municipality not imposed on his constitutional rights. The loss of these profits is, when the measure is suspect on constitutional grounds, the only monetary damages necessary to lead a court to a finding of invalidity. *Charles v. Diamond*, 41 N.Y. 2d 318, 392 N.Y.S. 2d 594 (1977).

In the case at bar, the Town has stated that the reason for upzoning is Indian Hill Road. Yet the Town has ignored the offer by the plaintiffs to build an alternative road which will not require any use of Indian Hill Road. This new road would go directly from Route 6 across the plaintiffs' easement onto the subject property. The Town is using the existing road as an excuse to prevent development. Under the rule of *Charles v. Diamond, supra*, the Town would bear the burden of providing the needed improvements even if there were no alternative route, because

the problem was not caused by the plaintiffs' property, but is general to the community.

The question to be resolved, the court held in *French v. City of New York*, 39 N.Y. 2d 592, 385 N.Y.S. 2d 5 (1976), is whether the enactment under the police power is reasonable. If it is not reasonable, it violates due process. Reasonability is determined by balancing the private and social needs. If the ordinance does not have a substantial relation to the furtherance of the public health, safety, morals or general welfare, it is unconstitutional. And if it is arbitrary, in that the ends and the means are not reasonably related, it is unconstitutional. Finally, the court in *French* held, if the ordinance "renders the property unsuitable for any reasonable income productive or other private use for which it is adapted and thus destroys its economic value, or all but a bare residue of its value" it is also unconstitutional. 39 N.Y. 2d 596.

In the case at bar, the plaintiff is being forced to bear the burden of loss of a valuable property right so that his neighbors can preserve a greenspace which enhances the value of their property. The regulation is enacted under the guise of the police power, but in reality it merely gives away what the plaintiff has so that others may enjoy a scenic vista. This is not what the zoning power was intended to be. If the neighbors of the plaintiffs want to have the Town take the plaintiffs' property, then they should be willing to pay for the benefits they receive. If they are not willing to pay for these benefits, it is a violation of the basic principles of fairness to impose the whole cost on the plaintiffs.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court grant their petition for a writ of certiorari.

Respectfully submitted,

KENNETH F. McCALLION
Counsel of Record
PETER H. McCALLION
Attorneys for Petitioners

APPENDIX A — MOTION FOR LEAVE TO APPEAL OF THE COURT OF APPEALS, STATE OF NEW YORK DATED JANUARY 16, 1992

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixteenth day of January A.D. 1992

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

Mo. No. 1342

John R. McGovern, et al.,

Appellants,

v.

Town of Yorktown, et al.,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

s/ Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

APPENDIX B — NOTICE OF APPEAL OF THE COURT OF APPEALS, STATE OF NEW YORK DATED OCTOBER 24, 1991

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-fourth day of October A.D. 1991

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

Mo. No. 1168 SSD 81

John R. McGovern, et al.,

Appellants,

v.

Town of Yorktown, et al.,

Respondents.

The appellants having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and same hereby is dismissed without costs, by the Court *sua sponte,* upon the ground that no substantial constitutional question is directly involved.

s/ Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

APPENDIX C — DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT DATED APRIL 8, 1991

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

1024u
C/hu

___ AD2d ___ Argued - March 7, 1991

CHARLES B. LAWRENCE, J.P.
GERALDINE T. EIBER
VINCENT R. BALLETTA, JR.
DAVID S. RITTER, JJ.

1862E

John R. McGovern, et. al., appellants, v
Town of Yorktown, et al., respondents.

DECISION & ORDER

Peter H. McCallion, Ossining, N.Y., for appellants.

Michael Grace, Town Attorney, Yorktown Heights, N.Y., for respondents.

Appeal by the plaintiffs from an order of the Supreme Court, Westchester County (Miller, J.), entered October 13, 1989.

Appendix C

ORDERED that the order is affirmed, with costs, for reasons stated by Justice Miller at the Supreme Court.

LAWRENCE, J.P., EIBER, BALLETTA and RITTER, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

April 8, 1991

McGOVERN v. TOWN OF YORKTOWN

[Stamped]
FILED
AUG 6 1991
ANDREW J. SPANO
COUNTY CLERK
COUNTY OF WESTCHESTER

APPENDIX D — DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF WESTCHESTER DATED OCTOBER 13, 1989

To commence the statutory time period for appeals as of right [CPLR 5513 (a)], you are advised to serve a copy of this order with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

INDEX NO. 14406-1988

DATE OF MOTION:
MAY 4, 1989

PRESENT: HON. SONDRA MILLER

JOHN R. McGOVERN, NAT SILVER AND CARL SHUBERT,

Plaintiff(s),

-against-

TOWN OF YORKTOWN, TOWN BOARD OF YORKTOWN AND NANCY ELLIOTT, NEAL BAILENSON, GARY AJELLO, BARBARA WILKENS AND ALBERT HAMMOND, sued individually,

Defendant(s).

Appendix D

DECISION AND ORDER

The following papers numbered 1 to 37 were read on this motion by defendant to dismiss the complaint and cross-motion by plaintiff for summary judgment:

Notice of Motion/Affidavits	1-25
Cross-Motion	27
Answering Affidavits	26, 36
Replying Affidavits	
Filed Papers	
Memorandum	
Pleadings/Exhibits/Stipulations/ Minutes	28-35, 37

Upon the foregoing papers it is ORDERED that the motions are disposed of as follows:

Plaintiffs allege eight causes of action against the defendant Town of Yorktown and the individual members of the Town Board of the Town of Yorktown. Each cause of action arises out of rezoning or "upzoning" from 1/2 acre to four-acre zoning of "The Property" in the Indian Hill area held in common by the three plaintiffs. The rezoning pursuant to Local Law 25/1987 of the Town of Yorktown went into effect approximately one year after the plaintiffs purchased the property.

The eight causes of action include allegations of: (l) "spot zoning" (2) unconstitutional taking without due process of law, (3) violation of the equal protection clause; (4) a violation of civil rights under color of law; (5) "other torts"; (6) violation of Town Law; (7) violation of the State Environmental Quality Review Act; and (8) eminent domain.

Appendix D

Defendant Town moves to dismiss the complaint pursuant to CPLR, Section 3211(a)(7) for failure to state a cause of action. The plaintiffs crossmove for summary judgment pursuant to CPLR 3212, declaring that the local law 25/1987 of the Town of Yorktown is unconstitutional as applied to plaintiffs' property, to enjoin the Town from enforcing the law against plaintiffs, and for $1,400,000.00 in compensatory damages and $5,000,000.00 in punitive damages. The defendant in its reply papers requests that the motion to dismiss be deemed a motion for summary judgment because such pleadings have been served.

The complaint was served subsequent to a Notice of Claim served on the Town Clerk and Town Attorney on December 14, 1987, Hearings were held pursuant to General Municipal Law, Section 50-H.

Local Law 25/1987 of the Town of Yorktown creates a new R1-160 zoning district which increases the minimum lot size in the district including plaintiff's property from 20,000 to 160,000 square feet. In brief, plaintiff's property has been re-classified from one-half acre to four-acre zoning.

As their first cause of action the plaintiffs allege that the upzoning constitutes "spot zoning". Spot zoning is the singling out of a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of the property and to the detriment of other owners. In this case, the benefits are reversed but the principe of discrimination remains. If the enacting authority acts in accordance with a comprehensive plan, however, the change will not be condemned as spot zoning (*Kravetz v. Plenge*, 84 AD2d 422).

I have examined the Towns Master Zoning Plan and find

Appendix D

that the upzoning of 1987 of which plaintiff complains is consistent with the Town's 1983 Comprehensive Master Plan for the Indian Hill area, which calls for low-density zoning. The purpose of a comprehensive plan is "the control of land uses for the benefit of the whole community based upon consideration of its problems and applying the enactment or a general policy to obtain a uniform result not enacted in a haphazard or piecemeal fashion" (*Kravetz*, supra at p. 429). The Town Development Plan of 1983 meets the Kravetz standard, as it appears to reflect the interdependence of physical, social and economic factors in community development. It encompasses all geographic parts of the community, based upon a pattern for town development established in 1956, 1966, and the prior plan of 1980. The Comprehensive Plan of 1983 zones as low density other areas in the Town as well as the area in issue for legally sufficient and reasonable grounds.

Plaintiff's property is in the Indian Hill area at the northern boundary of the Town: The natural characteristics of the land, the existing pattern of development, the lack of public services and the existence of restrictive covenants were the bases for low-density designation (see 1983Plan, p. 56).

The legislative findings behind the enactment of the most recent amendment which is the subject of this lawsuit were: (1) the geographic area, on and near Indian Hill, characterized by steep slopes and a narrow, substandard road system; (2) the additional, intolerable traffic burden on this narrow, substandard road system by the continued development of the area with its current high-density R1-20 zoning designation

In accordance with the upzoning, the zoning map amended and reclassified not only plaintiffs' property but 52 parcels in total in the Indian Hill area.

Appendix D

Therefore, plaintiffs' contention that their property was singled out for a use classification totally different from the surrounding area is not substantiated by the evidence.

Accordingly, defendant's motion for summary judgment on the first cause of action alleging spot rezoning is granted.

The second cause of action alleges an unconstitutional taking without due process of law.

Two amendments to the United States Constitution safeguard property rights from governmental interference. Those amendments are the Due Process Clauses of the Fifth and Fourteenth, and, the "taking" or just compensation clause of the Fifth. The Federal constitutional requirement of due process of law has been made applicable to the States through the Fourteenth Amendment. Further, the United States Supreme Court in *Chicago Burlington & Quincy R. R. Co. v. Chicago*, 166 U.S. 226, 17 SCt. 581, (1987), made the "taking" or "just compensation clause of the Fifth Amendment applicable to the States.

New York's Constitution also declares that no person shall be deprived of his property without due process of law (see, N. Y. Const. Art. I, Section 6), and that private property may not be taken without just compensation (N. Y. Cont., Art I, Section 7, subdivision (a)).

Plaintiffs contend the standard in takings clause jurisprudence has been redefined by the recent United States, Supreme Court decision *Nollan v. California Costal Commission*, 107 S Ct. 3141 (1987).

Appendix D

In *Nollan*, the Supreme Court invalidated a condition imposed by a California State agency on the grant of a building permit. The imposition of the condition, in that case granting a public easement for public access to the beach as a condition for obtaining a building permit, was viewed as an unconstitutional taking, because, *inter alia*, the condition was not designed to further a legitimate State interest. The Court made clear that in the case of zoning and land use regulation, conditions imposed on development must "substantially advance legitimate state interest", and not deny "an owner . . . [an] economically viable use of his [or her] property" (*Nollan, supra,* 107 S Ct. at 3147; see also *Agins v. Tiburon,* 447 US 255, 260, 100 SCt. 2138, 2141). In other words, there must be a relationship between the purpose of the legislation and the methods employed. Therefore, once a genuinely valid purpose is established, a law can restrict the use of property, "unless the denial would interfere so drastically with the . . . . use of . . . property as to constitute a taking" (*Nollan v. California Costal Comm'n, supra* 107 S. Ct. 3141, 3147).

In this case, plaintiffs contend Local Law 25/1987 fails to meet the minimum constitutional requirements mandated by *Nollan*, as there is an insufficient relationship between the regulation and the property regulated. They further argue that the Town cannot burden the plaintiffs with the denial of a use of their property which has been permitted during all the years of intense development around them, with the accompanying traffic and demand for municipal services.

However,the legislation at issue is designed to alleviate certain adverse topographical effects that will occur with development of the land. The benefits to be derived will not solely accrue to plaintiffs' property but will accrue to all property similarly situated within the re-classified zone.

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Plaintiff, however, has failed to establish the absence of a nexus between the rezoning and the Master Plan. There exists in fact, the necessary connection between regulation and government purpose.

Having established a genuinely valid purpose, such legislation can constitutionally restrict the use of property "unless the denial would interfere so drastically with the . . . use of a property as to constitute a taking" *Nollan*, supra 107 S. Ct. at 3147.

Furthermore, an owner who attacks a zoning ordinance as violative of the Fifth Amendment on the ground that its economic impact amounts to confiscation must show more than that the reclassification has caused a significant diminution in value or that a substantially higher value could be obtained if an alternate use is permitted. *Curtiss Wright v. E. Hampton*, 82 AD 2d 551. The owner must show he cannot receive a reasonable return on his property under the existing regulation (*Curtiss-Wright v. E. Hampton*, supra 82 AD 2d at 553).

The testimony of the plaintiffs taken pursuant to the General Municipal Law, Section 50-H reveals that not only will "The Property" still produce a reasonable return but that is will produce a substantial return. The testimony revealed that the property was purchased in 1976 for $20,000.00 and the assumption of a $44,000.00 mortgage; that a one-acre lot was sold in 1983 for $13,000.00; that in March 1985 the property had an appraised value of $212,000.00; and that in March, 1987 the plaintiffs were tentatively offered $450,000.00 and then $500,000.00 for the parcel. These offers were rejected pending the outcome of litigation. Since the upzoning, an appraisal of the property on January 27, 1989 valued the property at $319,000.00.

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Every law is presumed constitutional, and, only when unconstitutionality is shown to exist beyond a reasonable doubt, is the presumption overcome (*Difance Milk Prods. Co. v. Du Mond*, 309 NY 537, 541 (1956); *Montgomery v. Daniels*, 38 NY2d 41, 54. This presumption of constitutionality is not limited to State statutes, since it "applies. . . . to ordinances of municipalities as well. . . ." (*Lighthouse Shores v. Islip*, 41 NY2d 7, 11).

The testimony of the plaintiffs alone is sufficient grounds to grant defendant's motion for summary judgment on the second cause of action. The plaintiffs have failed to show the requisite lack of connection between the amendment and the Town's Master Plan, and they have not demonstrated that the property cannot be profitably sold, used or leased under the zoning ordinance. (*Dodge Mill Land v. Amherst*, 61 AD2d 216, 221).

The third and fourth causes of action allege a violation of the equal protection clause of the U. S. Constitution. The fourth cause of action seeks compensation because of the violation of due process.

Equal protection claims (US Const., 14th Amend., Section 1; NY Const., Art. 1, Section 11) are judged by the "rational basis" or strict scrutiny" test (*Alevy v. Downstate Medical Center*, 39 NY2d 326 (1976)). Where, as here, there is no suspect classification such as race, lineage, nationality or fundamental right at issue the rational basis test is applied. *Alevy, supra* 39 NY 2d at 332; *Maresca v. Cuomo*, 64 NY2d 242, 250-1, app. dism. 474 US 802 (1984). Under that test, the statute or regulation is presumed valid and must be upheld if the challenged classification is rationally related to achievement of a legitimate state purpose (*Trump v. Chu*, 65 NY2d 20 (1985), app. dism. 474 U.S. 915 (1985)).

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The rule was recently summarized in the *Town of Brookhaven v. State of New York*, 142 AD2d 338, 340 (3rd Dept. 1988)):

> "Since neither a suspect classification nor a fundamental right is called into issue by plaintiffs' equal protection claim, the subject provisions of the chapter laws will pass constitutional muster if they can be said to rationally further a legitimate State purpose Significantly, the rationale justifying that purpose may be based upon 'any reasonable known or conceivable state of facts' Thus, if defendants can demonstrate a perceived legitimate State objective that will be promoted by the legislative provisions under attack, they are entitled to summary judgment."

The facts and legitimate governmental purposes underlying the rezoning do not substantiate plaintiff's claim of a deprivation of equal protection. Plaintiffs' parcel is one of several parcels subject to the rezoning, and as such, is treated the same as everyone else similarly situated.

The motion for summary judgment on the third and fourth causes of action is granted.

The fifth cause of action sounds in "other torts". The "other torts" include malicious interference with plaintiffs' contractual relations; malicious interference with prospective business relations; conspiracy to and perpetration of a fraud upon plaintiffs and upon the voters of the Town of Yorktown by falsely stating the real reasons for the upzoning and deliberately disseminating false and misleading information.

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No set of facts is pleaded that give rise to these causes of action. Rather, the cause of action is vague and general and fails to comply with the "specificity" requirements of CPLR, Section 3016 for fraud actions. Further, plaintiffs have failed to plead the existence of a business or contractual relationship with defendant, much less interference with the relationship. Therefore, defendant's motion for summary judgment on the fifth cause of action is granted.

The sixth cause of action seeks to invalidate the upzoning by alleging that the Town failed to give proper notice of the public hearings prior to the enactment of the local laws.

The affidavit of publication in the local newspaper (Exhibit 21 in the motion to dismiss) reflects that notice was given in compliance with the Town Law, Section 130. Therefore, the motion for summary judgment on the sixth cause of action is granted.

The seventh cause of action alleges a SEQRA violation. Any cause of action bought for the failure to follow SEQRA is not properly brought as a declaratory judgment action. Rather, it must be brought pursuant to CPLR Article 78. Further, any such cause of action must be brought within four months of the final determination made under SEQRA. The time to bring this proceeding has long expired; therefore, this cause of action must be dismissed.

Cause of action number eight seeks damages under the Eminent Domain Procedure Law. For the same reasons as set forth in the second cause of action, defendant's motion for summary judgment is granted.

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Inasmuch as the attorney who verified this complaint is not a party to the proceeding, no ethics violation has been shown and there is no appearance of impropriety.

Plaintiff's remaining contentions are without merit.

In view of the above, plaintiff's motion for summary judgment is denied, summary judgment is granted to defendants and this Court declares that local law 27/1987 is constitutional.

Dated: WHITE PLAINS, NEW YORK
October 13, 1988

s/ Sondra Miller
SONDRA MILLER
Justice of the Supreme Court

WHITE AND McCALLION, ESQS.
PETER McCALLION, ESQ.
Attorneys for the Plaintiffs
500 Executive Boulevard
Ossining, New York 10562

MICHAEL J. GRACE, ESQ.
TOWN ATTORNEY FOR THE
TOWN OF YORKTOWN
Defendants
363 Underhill Avenue
Yorktown Heights, New York 10598

[Stamped]
FILED AND ENTERED
ON OCT 13 1989
WESTCHESTER
COUNTY CLERK

APPENDIX E — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment, United States Constitution, which provides: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, property, without due process of law; nor shall private property be taken for public use without just compensation.

2. The Fourteenth Amendment, United States Constitution, Section 1, which provides: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. The Civil Rights Act of 1871, 42 U.S.C. 1983, which provides: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.